IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 125

VANDALIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

GUSTAV A. SCHNULL, WILLIAM J. GRIFFIN AND GEORGE G. GRIFFIN, Comprising the Firm of SCHNULL & CO., ET AL.,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

This supplemental brief of the defendants in error is filed pursuant to leave granted therefor at the argument herein had on December 17, 1920.

STATEMENT OF THE CASE.

The Railroad Commission of Indiana on December 14, 1906, pursuant to a full hearing made an order to

be effective from February 1, 1907, fixing a certain scale of class rates for application on the St. Louis Division of the Vandalia Railroad extending from Indianapolis west to the Illinois-Indiana state line. This order, in part, is set forth in the complaint herein appearing in the printed record at pages 4 and 5. On January 22, 1907, the railroad filed its Bill of Equity in the U. S. Circuit Court for the District of Indiana, seeking to enjoin this order. The temporary injunction was denied by the U. S. District Court for the District of Indiana, May 3, 1907, but a perpetual injunction was ordered by the U. S. Circuit Court June 29, 1909, from which order that proceeding was appealed to this Court upon writ of error and this Court in Wood vs. Vandalia R. R. Co., 231 U. S. 1, decided October 20, 1913, found that the rates fixed by this order were not shown to be confiscatory and the case was remanded with an order to dismiss without prejudice. The railroad did not institute supplemental proceedings in the Federal Court nor did it put into effect the rates ordered. The railroad on November 12, 1913, filed with the Public Service Commission of Indiana, the successor to the Indiana Railroad Commission, a petition for a rehearing on the order of December 14, 1906, which petition is set out in the printed record at page 95. This petition was denied on November 18, 1913, and on the same date there is of record a letter to Mr. John G. Williams, General Counsel, Vandalia Railroad, Indianapolis, Indiana, stating in effect that the Commission had decided not to grant a rehearing nor suspend the order but that the Commission was willing to consider the question of compromise rates provided the railroad would first comply with its order and recognize the authority of the

Commission by publishing the rates. This letter appears as Exhibit No. 16 in the trial of this case and is reproduced at page 97 of the printed record. The rates never having been published, the defendants in error, who are shippers interested in the effectiveness of these rates, filed on August 26, 1915, their petition in the Circuit Court of Marion County, Indiana, seeking a mandatory injunction requiring the plaintiff in error, the Vandalia Railroad Co., to apply the rates ordered. To this petition the railroad made answer in three paragraphs on December 13, 1915. The first paragraph setting forth a general denial, the second paragraph attempting to set forth a special defense based on alleged confiscation, and the third paragraph setting forth that the rates then being charged, which were higher than the rates ordered, were rates published in tariffs which had been filed pursuant to the amended provisions of the Railroad Act of Indiana. Demurrers to paragraphs two and three were sustained by the Superior Court of Marion County, to which the case had been removed, and the case went to trial on the general denial. *Upon this trial no evidence tendered by the Railroad was excluded.* The evidence offered at the trial included no facts relative to the confiscatory nature of the rates fixed in the order involved except extracts from the record made in the Federal Court in the Wood case upon which this Court found the rates not to have been shown to be confiscatory. Upon such a record the Superior Court of Marion County, gave judgment for the plaintiffs. The decree and the injunction granted in the decree were suspended for a period of 30 days, conditioned upon the filing of a suspense bond for $15,000 and certain other conditions recited (printed Record, page

27). An appeal from the judgment of the Superior Court of Marion County was taken to the Supreme Court of Indiana and that Court upon the record affirmed the judgment of the Superior Court. The case is now before this Court on writ of error to the Supreme Court of Indiana upon five assignments of error set forth in the printed record at page 114. The assignments of error broadly speaking raise two issues (1) that the Supreme Court of Indiana erred in sustaining the demurrer to paragraph 2 of the answer. (2) That the Supreme Court of Indiana erred in holding upon the record that these rates had not been shown to be confiscatory.

BRIEF OF THE ARGUMENT.

I.

Paragraph 2 of the Answer is as follows:

> "For a further and second paragraph of answer to plaintiff's complaint, Vandalia Railroad Company, defendant herein, says:
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> "That the rates specified in the order mentioned in said complaint and which was made and entered by the Railroad Commission of Indiana on the fourteenth (14th) day of December, 1906, and which by its terms was to become effective on the first (1st) day of February, 1907, will not yield to defendant revenue sufficient to reimburse defendant for its actual cost and outlay in handling and carrying the classes of property specified in said order of said Railroad Commission, and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying the classes of property in said order specified.

"And defendant further says that under Section 1 of Article 14 of the Constitution of the United States, defendant cannot be lawfully deprived of its property without due process of law, nor be deprived of the equal protection of the laws; and that if the rates specified in said order of the Railroad Commission of Indiana be enforced defendant will be compelled to handle and carry said classes of property in said order specified without deriving or receiving therefrom revenue sufficient to pay the actual cost to defendant of handling and carrying said classes of property and provide a fair return to defendant on the value of defendant's property used and employed in handling and carrying said classes of property, and defendant will thereby be deprived of its property without due process of law in violation and contravention of said Section 1 of Article 14 of the Constitution of the United States.

"Wherefore, defendant says that the rates specified in said order, of said Railroad Commission of Indiana, and likewise said order, are illegal and void, and prays to be herein dismissed and that it have judgment herein against plaintiffs for all its costs and charges herein laid out and expended."

The demurrer to this paragraph was properly sustained:

(a) For the reasons set forth in the original brief of the defendants in error.

(b) The paragraph is insufficient for the further reason that it states no issue of fact but the mere conclusion of the pleader as to a material fact.

(c) The paragraph is demurrable under the laws of Indiana because it states no defense under those laws.

The Railroad Act of Indiana of 1905 under which the Railroad Commission of Indiana undertook to pre-

scribe the rates fixed in this order under Section (6) thereof sets out the routine that should have been followed in the Courts of Indiana if any party affected by such order desired to contest same on the ground of its confiscatory nature, as follows:

> "Sec. 6: If any Railroad Company or other corporation or party in interest shall be dissatisfied with any rate, classification, rule, charge or general regulation made, approved, adopted or ordered by the Commission, such dissatisfied company or party may, within sixty days after any such action has been taken by the Commission, procure from the Secretary of the Commission, whose duty it shall be to furnish the same, a complete transcript of all the proceedings of the Commission relative thereto, and if he or it so desires, a copy of all the evidence heard or considered by the Commission at the hearing at which such action or decision was made, which evidence shall be incorporated into such transcript, and such dissatisfied company or party may file said transcript, with a concise written statement of its or his causes of complaint against the action of the Commission, in the office of the Clerk of the Appellate Court of Indiana within thirty days after procuring the same, and not later than ninety days after the action of the Commission complained of has been spread upon its records. Said complaining company or party shall, at the time of filing such transcript, give or cause to be given to said Commission written notice thereof, and shall, within five days thereafter file proof of such notice in the office of said Clerk of the Appellate Court, who shall, ten days thereafter, or upon the appearance of said Commission to said appeal, place said cause upon the docket of the said Appellate Court for hearing and determination. The Commission shall be made a party to such proceeding in the Appellate Court,

and shall defend the same. All such causes shall be given precedence over all other civil causes in said Appellate Court, and shall be heard and determined upon the transcript filed as aforesaid, as speedily as possible to the end that public interests may not suffer by reason of such appeal. Jurisdiction to hear and determine such appeals, and the power to adopt rules of procedure to facilitate the speedy determination thereof not inconsistent with this act, are hereby conferred upon the Appellate Court of Indiana. The Appellate Court shall have power to affirm the action of the Commission appealed from, or to change, modify or set aside the same as justice may require. The decision of the Appellate Court in any such matter, shall be final, and said Commission shall keep copies of all such findings and judgments on file in its office."

It is the contention of the defendants in error that this section specified the routine that was to be followed by the Vandalia Railroad if it wished to raise the question of the confiscatory nature of these rates; that this routine was the only routine permitted under the laws of Indiana; that paragraph 2 was not a compliance with this requirement of the substantive law of Indiana, that for this reason paragraph 2 failed to state a defense that was available to the Railroad in the State Court at the time of the filing of the answer.

The Railroad Act was amended in 1907 and Section 7. paragraph (c) added to the powers of the Commission as follows:

"(c) The Commission shall have authority to grant rehearings in any case in which it has made a final order, or to alter, change or modify any final order made by it. All orders of the Commis-

sion, except as otherwise provided in this act, shall take effect within such reasonable time, not more than thirty days after entry thereof, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or set aside, or modified by the Commission, or be suspended or set aside, or modified by a court of competent jurisdiction."

Pursuant to this power to grant rehearings the Railroad as has been before stated, on November 12, 1913, just after the decision by this Court of the Wood Case, filed a petition with the Railroad Commission to rehear the case and modify its order and this petition was denied by order of the Commission of November 18, 1913.

The amendment of 1907 also changed Section 6 above quoted to read in part as follows:

"Sec 6. Any carrier, or other party, dissatisfied with any final order made by the Commission, may, within thirty days after entry thereof, begin an action against the Commission in any court of competent jurisdiction in any county in this state into or through which any such carrier operates, to suspend or set aside any such order. Any party to any final judgment of any court in this state, in any proceeding by or against such Commission, may prosecute an appeal therefrom to the Supreme Court of this state in the manner now provided by law in civil cases, excepting as otherwise provided in this act."

Under this amended Section 6 the Railroad within 30 days from November 18, 1913, could have begun an action in the Marion County Circuit Court against the

Railroad Commission upon its order denying the rehearing. But rather than observe any of the routine specified in the state laws for raising in the state Courts the question of the confiscatory nature of the rates prescribed in this order, it chose to do nothing. It did not obey the order and it did not pursue the remedy open to it upon appeal.

There is nothing in the Railroad Act permitting a railroad against which an order has been entered, to set up the question of the confiscatory nature of the rates prescribed as a special defense in a suit which it is necessary to institute to enforce the application of the rates ordered.

Paragraph 2 was an attempt to raise a defense that was barred after the lapse of 30 days from the date of the order denying the rehearing. The paragraph consequently failed to state a defense under the state laws of Indiana, which are reasonable in their provisions.

Of course the Railroad still had its remedy in the Federal Court because the Wood case had been dismissed without prejudice but the present action was an action in the State courts and we submit that in the State Courts the matter alleged in this paragraph was not a defense when pleaded. It might have been a defense if pleaded within 90 days from February 1, 1907, or within 30 days from November 18, 1913, but by reasonable provision of the laws of Indiana it was barred as a defense on December 13, 1915, the date this answer was filed, in any proceeding in the State Courts of Indiana.

We submit that the Supreme Court of Indiana did not err in sustaining this demurrer.

II.

The case is before this Court on error to the Supreme Court of Indiana for alleged error committed by that Court in interpreting the rules of pleading of that State.

This Court will be reluctant to disturb the decision of a State Court interpreting its own rules of pleading unless it be made to appear that the error alleged has resulted in a denial of due process of law.

In the face of the provisions of the Indiana Railroad Act above quoted, it cannot be said that there has been any denial of due process in this case. Certainly it cannot be possible that a litigant must have his case decided by the Supreme Court of the United States else there is a denial of due process under the Federal Constitution.

III.

The sustaining of this demurrer in no wise affected the Railroad adversely in its case on the general denial.

It was insisted before the Supreme Court of Indiana that in the trial on the general denial the Railroad could have introduced any evidence on the question of confiscation which it might have introduced under its paragraph two and it is a fact as pointed out in the opinion of the Supreme Court of Indiana that no evidence offered was excluded.

IV.

The Supreme Court of Indiana did not err in finding on the evidence of record that the rates were not shown to be confiscatory.

The evidence of record insofar as it concerns the

issue of confiscation, is extracts from the record in the Wood case which this Court found to be barren of the necessary facts to establish the confiscation alleged.

In its decision the Supreme Court of Indiana was guided largely by the opinion of this Court in the Wood case.

In that case in an opinion delivered by Mr. Justice Hughes, it was stated at page 3:

> "There was no proof of the value of the complainant's property within the State of Indiana, or of the return it received from its entire intrastate business. Nor was there proof of the value of that portion of its road which was affected by the order, or of the return from all of its intrastate business upon that part of its lines. No attempt was made to supply proof of that sort. For all that appears, the Vandalia Company might enjoy, notwithstanding the enforcement of the rates in question, ample revenue from its intrastate operations to give it a fair return both as to all its lines within the state and also as to that portion to which the order referred."

The Court further said at page 8:

> "The evidence showed that the class rates on local traffic on the line between Indianapolis and the Illinois boundary which were maintained by the Vandalia Company and condemned by the Commission as unreasonable were higher than the class rates for corresponding distances to local stations in Indiana on other lines (including one of the Vandalia company's divisions) running out of Indianapolis to the east and south. It wholly failed to sustain the contention that the action of the Commission in ordering the reduction complained of transcended the limits imposed by the 14th Amendment."

V.

This case is *res adjudicata* in this Court.

As outlined heretofore the record of the trial on the general denial contains only extracts from the Wood case on the question of confiscation. The same question is before the Court as was presented in the Wood case upon the identical facts tried once before in that case.

VI.

This case will be tried on the evidence and not upon an implied admission of the confiscation under the demurrer to paragraph 2.

The admission of the demurrer will be considered as such only for the purpose of testing the demurrer.

The admissions under the demurrer will not be taken as establishing the fact of confiscation when the confiscation is alleged as a mixed question of law and fact, as here.

Paragraph 2 does not set out the facts which if proved would as a legal conclusion result in confiscation. The allegation as made is an allegation of mixed law and fact.

In Reagan vs. Farmers Transportation Trust Company, 154 U. S., 362 at page 401; this Court said:

> " * * * There are often in pleadings general allegations of mixed law and fact, such as of the ownership of property and the like, which standing alone are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled by particular facts stated therein. It would not, of course, be tolerable for a Court administering equity to seize upon a technicality for the purpose

or with the result of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the Commission are unjust and unreasonable. * * * "

VII.

This Court in Northern Pacific R. R. Co. vs. North Dakota, Ex. Rel., McCue, 236 U. S., 585, did not overrule its decision in the Wood case, *supra*, as plaintiffs in error seem to contend.

Mr. Justice Hughes wrote both opinions and in his opinion in the North Dakota case he took occasion to distinguish that case from the Wood case on the facts at page 603 as follows:

> "In Wood vs. Vandalia R. R. Co., 231 U. S., 1, rate order of the State Commission related to the particular sort of traffic, and it appeared that the proof was insufficient to show the cost of transportation."

VIII.

This case has become a moot case in this Court.

Since the order of the Railroad Commission of Indiana of December 14, 1906, the Interstate Commerce Commission has increased the interstate rates applicable in the State of Indiana by varying percentages at different times as follows: In 1914—5% (The Five Per Cent Case, 31 I. C. C., 351; 32 I. C. C., 325); in 1917, pursuant to the so-called Central Freight Association class rate scale readjustment a further increase was permitted which cannot be stated as a uniform percentage, the increases varied, averaging, however, approxi-

mately 25% (C. F. A. Class Scale Case, 45 I. C. C., 254, appendix, page 294 and page 299); in 1917 a further increase of 15% (The Fifteen Per Cent Case, 45 I. C. C., 301); June 25, 1918, 25% authorized under Director General's Order No. 28; a further increase authorized by the Interstate Commerce Commission as of August 26, 1920, of 40% (Increased Rates, 1920, 58 I. C. C., 223).

The Transportation Act of 1920 (41 Stat., L., 456) effective March 1, 1920, amended Section 13, paragraph 3 of the Interstate Commerce Act providing that any interstate carrier may file a complaint with the Interstate Commerce Commission against any intrastate rate which it deems to be too low. And the Interstate Commerce Commission is given jurisdiction under paragraph 4 of Section 13 upon such a complaint after a full hearing to remove any unjust discrimination against interstate commerce by increasing the intrastate rate:

> "the law of any state or the decision or order of any state authority to the contrary notwithstanding."

Any intrastate rate or set of rates which the Interstate Commerce Commission upon such complaint may find to be unduly low must necessarily result in an undue burden upon interstate commerce and any undue burden upon interstate commerce must necessarily be an unjust discrimination against interstate commerce such that the jurisdiction of the Interstate Commerce Commission under Section 13, paragraph 4 attaches and gives it authority to increase such intrastate rate or rates.

This new statute power over intrastate rates imposed upon the Interstate Commerce Commission by this amendment is but the substantive enactment of the doctrine announced by this Court in Houston & Texas Ry. vs. United States, 234 U. S., 342. (The Shreveport Case.)

Consideration of the confiscatory nature of any rates is nothing more nor less than a consideration of the reasonableness *per se* of the particular rates. This Court in construing the powers of the Interstate Commerce Commission with respect to interstate rates has uniformly held that since the passage of the Hepburn Act endowing the Interstate Commerce Commission with the power to prescribe reasonable interstate rates, the Courts are without jurisdiction to pass upon the question of the reasonableness *per se* of any interstate rate but that that question is one for the sole jurisdiction of the Interstate Commerce Commission and the Courts will review the orders of that Commission only to the extent that such orders appear to be arbitrary or against the evidence.

The new power of the Interstate Commerce Commission over intrastate rates imposed by this amendment, in a proper case, gives it the same authority to pass upon the reasonableness *per se* of intrastate rates as it has in determining the reasonableness *per se* of interstate rates.

Should not this Court apply the same rule with respect to this new power of the Commission over intrastate rates as it has always applied with respect to the Commission's jurisdiction over interstate rates? This new power being reposed in the Interstate Commerce Commission by the Congress, will this Court undertake to pass upon the facts themselves except to review the

findings of that Commission as to the facts where those findings are alleged to be arbitrary or against the evidence?

It is our contention that this amendment to the Interstate Commerce Act when applied in connection with the doctrine that this Court has uniformly announced with respect to the jurisdiction of the Interstate Commerce Commission over interstate rates has, in a sense, ousted the jurisdiction of the Courts henceforth to try the question of alleged confiscation (unreasonableness) of intrastate rates as much so as the question of confiscation (unreasonableness) with respect to interstate rates.

This case is a moot case in this Court for the further reason that the Public Service Commission of Indiana, the successor of the Railroad Commission, has adopted for intrastate application generally all the increases authorized by the Interstate Commerce Commission except the last 40% increase, in lieu of which it has authorized an increase of 33 1/3%. A complaint is now pending, however, before the Interstate Commerce Commission (In the Matter of Rates, Fares and Charges Applicable Between Points in the State of Indiana, I. C. C. Docket, No. 11,894) in which the interstate carriers serving Indiana, including the Vandalia Railroad, are seeking to have that Commission under its amended powers, apply the full 40% increase to the Indiana intrastate rates.

If the carriers are successful in this last mentioned proceeding the intrastate rates generally in Indiana will have been increased 110% since the rates in this order were prescribed. The rates at present in effect between the points here involved include all the increases al-

lowed based not upon the rates fixed in this order but upon the rates which the Commission found to be unreasonable.

Since the increases aggregating already 103 1/3% allowed by the Indiana Commission were general increases applicable to all intrastate rates in the state it is but the fair implication to presume that the rates which the Railroad would be required to apply if this Court dismisses this appeal, will be the rates fixed effective February 1, 1907, increased 103 1/3% or such other percentage as has been generally applied since that date.

It is true that a perpetual injunction was decreed by the Superior Court of Marion County and that this judgment was affirmed by the Indiana Supreme Court, yet if this Court dismisses this appeal and does not affirm the decision of the Supreme Court of Indiana, the matter will repose in such a status that the blanket increases can be applied in spite of the perpetual injunction. If the Railroad should put in the rates ordered effective Feb. 1, 1907, increased 103 1/3% or other percentage generally authorized and it was cited to show cause why it should not be punished for contempt, a showing that the Indiana Commission had authorized the general increases applied, would or should be a showing of sufficient cause why it should not be punished. It should be noted also that in the order suspending the decree (page 28 printed record) the right of the railroad to apply to the Court for any modification of the decree is specifically reserved. Or the Railroad could file a complaint with the Interstate Commerce Commission against the present application of rates ordered to be effective February 1, 1907, and se-

cure relief. The authority of the Interstate Commerce Commission to increase intrastate rates is to be observed:

> "The law of any state or the decision or order of any state authority to the contrary notwithstanding."

The instant case is distinguishable from the decision in Groesbeck v. Duluth, South Shore & Atlantic R. R. Co., 250 U. S., 607.

1. Since that decision (November 10, 1919) the Interstate Commerce Act has been amended as above indicated.

2. In that case the rate was prescribed by statute and no routine was provided for review in the State Courts of its confiscatory nature. There was no due process available to the litigants except to have the question of who was entitled to the impounded funds passed upon by this Court. Here, however, the rates were prescribed by a State Commission and ample and sufficient routine or procedure was provided for review in the State Courts of the rates prescribed. The Supreme Court of Indiana in interpreting the rules of procedure so provided has decided to whom the impounded funds belong and we submit that in that decision there has been no denial of due process of law.

IX.

The defendants in error, shippers of Indiana, have been kept out of the rates to which the rate regulating authority of their State after full hearing and in due course has decided they were entitled to enjoy.

We submit that these shippers are entitled to the

judgment of this Court affirming the judgment of the Supreme Court of Indiana or dismissing this appeal.

Respectfully submitted,

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GIDEON L. BAKER,
Of Counsel.